STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions

November 10, 1956

LETTER OF TRANSMITTAL

To His Excellency Goodwin J. Knight
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study relating to the use of motions and orders to show cause in connection with awards of attorney's fees and costs pursuant to Civil Code Section 137.3. The commission herewith submits its recommendation relating to this subject and the research study prepared by its staff.

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Executive Secretary
November 10, 1956

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions

Civil Code Section 137.3 (hereinafter referred to as "Section 137.3") authorizes trial courts to make and modify awards of attorney's fees and costs in actions for divorce, separate maintenance, annulment, and the support, maintenance or education of children if such relief is requested in the complaint, cross-complaint or answer. The section specifies that an award may be made or modified upon application therefor by "an order to show cause or motion." It is not clear from the statute or from appellate court decisions whether this language means that a motion or an order to show cause is required when the award is to be made at the time of the hearing on the merits in the action or whether service of a notice of motion or order to show cause must be made on a party who is in default. The trial courts of some counties have held that a motion or order to show cause must be used and must be served on the adverse party in all cases where an award of attorney's fees or costs is made.

The commission believes that a motion or order to show cause should not be required, even as to a party not in default, when an award of attorney's fees and costs is made at the time of the hearing on the merits in the action. The party against whom the relief is sought is apprised of the claim by the complaint, cross-complaint or answer and is given notice of the hearing on the merits. Thus, he has ample opportunity to contest the claim. The commission recommends, therefore, that Section 137.3 be amended to provide that no application or notice other than an oral motion in open court is necessary when attorney's fees and costs are awarded at the time of the hearing on the merits in the action.

The commission also believes that no application or notice other than an oral motion in open court should be necessary when attorney's fees and costs, not exceeding the amount prayed in the complaint, are awarded prior to judgment, whether at the time of the hearing on the merits or at a separate proceeding, against a party whose default has been entered pursuant to Section 585 or Section 586 of the Code of Civil Procedure. Of course, a party not in default is and should be entitled to notice of an application for attorney's fees or costs to be awarded in a separate proceeding prior to the hearing on the merits. The general rule under Sections 1010 and 1014 of the Code of Civil Procedure is, however, that a party in default is not entitled to notice of any proceeding in the action. There would appear to be no reason for a different rule for cases falling within Section 137.3. If a party wishes to be notified of a separate proceeding for attorney's fees and costs prior to the hearing on the merits, he can put himself in a position to receive

such notice by participating in the action to the extent necessary to avoid being defaulted. The commission believes, however, that a party in default should be given notice when an award of attorney's fees and costs is to be made after judgment because such an award is sufficiently rare in cases in which the defendant has defaulted that he should not be required to anticipate it in the ordinary course of events.

It should be noted that the commission's recommendation relates only to the questions of when a motion or order to show cause must be used and when notice thereof must be given. The recommendation does not affect existing requirements as to the showing which the moving party must make to substantiate his claim at the hearing on an application made for attorney's fees and costs.

The commission's recommendation would be effectuated by the enactment of the following measure: *

An act to amend Section 137.3 of the Civil Code, relating to attorney's fees and costs in certain actions.

The people of the State of California do enact as follows:

SECTION 1. Section 137.3 of the Civil Code is amended to read:

137.3. During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code and of any action for divorce or for separate maintenance, or for the support, maintenance or education of children, ~~upon an order to show cause or motion, and if such relief is requested in the complaint, cross-complaint or answer,~~ the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees *if such relief is requested in the complaint, cross-complaint or answer* ; and from time to time and before entry of judgment ~~upon application as aforesaid~~, the court may augment or modify the original award, if any, for costs and attorney's fees as may be reasonably necessary for the prosecution or defense of the action or any proceeding relating thereto. In respect to services rendered after the entry of judgment, ~~upon application by an order to show cause or motion,~~ the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter ~~upon application as aforesaid~~ augment or modify any award so made. Attorney's fees and costs within the provisions of this section may be awarded for legal services rendered or costs of action incurred prior, as well as subsequent, to any application or order of court therefor, including services

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted.

rendered or costs incurred prior to the filing of the complaint. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary.

An application for an order making, augmenting, or modifying an award of attorney's fees or costs or both may be made by motion or by an order to show cause.

No application or notice, other than an oral motion in open court, is necessary when attorney's fees or costs or both are awarded:

(a) At the time of the hearing on the merits;

(b) At any time prior to judgment against a party whose default has been entered pursuant to Section 585 or Section 586 of the Code of Civil Procedure. With respect to divorce actions, judgment as used in this subdivision means interlocutory judgment.

A STUDY RELATING TO THE USE OF MOTIONS AND ORDERS TO SHOW CAUSE IN CONNECTION WITH AWARDS OF ATTORNEY'S FEES AND COSTS PURSUANT TO CIVIL CODE SECTION 137.3 *

Civil Code Section 137.3 authorizes trial courts to make and modify awards of attorney's fees and costs in actions for divorce, separate maintenance, annulment, and the support, maintenance or education of children if such relief is requested in the complaint, cross-complaint or answer.[1] It provides that the award may be made or modified at any time before entry of judgment for services rendered prior to judgment and after entry of judgment for services rendered after judgment. Section 137.3 specifies that an award may be made or modified upon application therefor by "an order to show cause or motion." Interpreted literally, this language would apply in all cases and thus require that a notice of motion or an order to show cause be served on the adverse party even though he is in default or the award is to be made at the time of the hearing on the merits in the action. Whether the use and service of a motion or order to show cause is required in such cases by Section 137.3 and, if so, whether such requirement should be continued is the subject of this study.

USE OF MOTIONS AND ORDERS TO SHOW CAUSE IN AWARDING ATTORNEY'S FEES AND COSTS

Prior to 1953 attorney's fees and costs were routinely sought and awarded at the outset of a divorce, annulment, separate maintenance, or child support action, the matter being brought before the court by a motion or order to show cause. The application was not deferred until the time of the hearing on the merits because the courts had held that an award could not be made for attorney's fees and costs incurred

* This study was made by the staff of the Law Revision Commission with the assistance of Mr. Selim S. Franklin.

[1] "During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code and of any action for divorce or for separate maintenance, or for the support, maintenance or education of children, upon an order to show cause or motion, and if such relief is requested in the complaint, cross complaint or answer, the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees; and from time to time and before entry of judgment upon application as aforesaid, the court may augment or modify the original award, if any, for costs and attorney's fees as may be reasonably necessary for the prosecution or defense of the action or any proceeding relating thereto. In respect to services rendered after the entry of judgment, upon application by an order to show cause or motion, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter upon application as aforesaid augment or modify any award so made. Attorney's fees and costs within the provisions of this section may be awarded for legal services rendered or costs of action incurred prior, as well as subsequent, to any application or order of court therefor, including services rendered or costs incurred prior to the filing of the complaint. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary." CAL. CIV. CODE § 137.3.

prior to the making of the order,[2] unless there was an application at the outset of the action and the parties had stipulated or the court had ordered that determination of the amount of the award should be deferred.[3] For a time, the courts had awarded attorney's fees and costs on ex parte application [4] but this practice was condemned in *Baker* v. *Baker*, decided in 1902.[5] Thereafter the regular practice was to bring the matter before the court by a motion or order to show cause shortly after the complaint was filed.

In 1953 the Legislature amended Civil Code Section 137.3 to abrogate the long-standing rule that an order awarding attorney's fees and costs could not include reimbursement for expenses incurred prior to the date of the order.[6] The principal purposes of the 1953 amendment appear to have been: (1) to authorize an award to be made under Section 137.3 for services performed prior as well as subsequent to the court's order; (2) to authorize an award for services performed subsequent to judgment; [7] (3) to authorize augmentation or modification of any award made; [8] and (4) to make these changes applicable to an award of attorney's fees and costs in an annulment action.[9] However, the amendment also provided that an order making, augmenting or modifying an award of attorney's fees and costs should be made "upon an order to show cause or motion". This language would appear to require the use of a motion or order to show cause in every case, including those in which the award is to be made at the hearing on the merits or against a party in default.[10] It is not clear from appellate court decisions whether the statute will be given this interpretation. However, the trial courts of some counties have apparently so read Section 137.3 and require that a motion or order to show cause be used and served on the adverse party in every case in which an award of attorney's fees and costs is to be made.

Award of Attorney's Fees and Costs at the Time of the Hearing on the Merits in the Action

A party who has appeared in an action and who is not in default is entitled to notice of any proceeding therein which may affect his

[2] Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056 (1895); Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87 (1893); Burdick v. Burdick, 95 Cal. App. 304, 272 Pac. 752 (1928).

[3] Wilson v. Wilson, 33 Cal.2d 107, 199 P.2d 671 (1948); Smith v. Smith, 115 Cal. App.2d 92, 251 P.2d 720 (1952); Line v. Line, 75 Cal. App.2d 723, 171 P.2d 733 (1946); Brockmiller v. Brockmiller, 57 Cal. App.2d 623, 135 P.2d 184 (1943).

[4] See references to prior practice in Hall v. Hall, 42 Cal.2d 435, 267 P.2d 249 (1954) and Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114 (1893). The husband could challenge the order by a proceeding to have it set aside or modified. Hall v. Hall and Mudd v. Mudd, *supra*.

[5] 136 Cal. 302, 68 Pac. 971 (1902). *But cf.* Arnold v. Arnold, 215 Cal. 613, 12 P.2d 435 (1932) suggesting that an ex parte application for attorney's fees and costs would have been proper.

[6] Cal. Stat. 1953, c. 620, §1, p. 1864.

[7] This codified decisions interpreting "pendency" of such an action to include appeal, modification of the decree, and other proceedings after judgment. Wilson v. Wilson, 33 Cal.2d 107, 199 P.2d 671 (1948); Nelson v. Nelson, 7 Cal.2d 449, 60 P.2d 982 (1936).

[8] This, too, codified decisional law. Warner v. Warner, 34 Cal.2d 838, 215 P.2d 20 (1950); Glesby v. Glesby, 73 Cal. App.2d 301, 166 P.2d 347 (1946).

[9] In 1947 Civil Code Section 87 was enacted, providing that attorney's fees and costs might be awarded in certain annulment actions. Cal. Stat. 1947, c. 951, §1, p. 2220. McClure v. Donovan, 86 Cal. App.2d 747, 195 P.2d 911 (1948) held that an award could not require payment for attorney's services rendered prior to the application for allowance of fees.

[10] See Reports of the State Bar Committee on Administration of Justice, 26 CAL. B.J. 187, 193 (1951); 28 CAL. B.J. 256, 269 (1953). See also Supplement to Second Progress Report of Senate Interim Judiciary Committee 32 (1953).

rights.[11] Accordingly, if an award of attorney's fees and costs under Section 137.3 is sought against such a party in a proceeding separate from the hearing on the merits, he should be given notice thereof through service on him of a motion or order to show cause. But if no such preliminary proceeding is initiated and the application for attorney's fees and costs is made at the time of the hearing on the merits, special notice thereof would seem to be unnecessary.[12] The party against whom the relief is sought is apprised of the claim therefor by the complaint, cross-complaint, or answer. He is given notice of the hearing on the merits[13] and thus has ample opportunity to contest the claim.

Award of Attorney's Fees and Costs Against a Party in Default

Section 1010 of the Code of Civil Procedure, which provides generally for the service of notice of motions, states in part:

> No * * * notice or paper, other than amendments to the pleadings, or an amended pleading, need be served upon any party whose default has been duly entered or who has not appeared in the action or proceeding.[14]

A defendant's default may be entered under Section 585 of the Code of Civil Procedure if he fails to demur or answer to the original complaint and under Section 586 of the code if he fails to answer an amended complaint, or to answer within the time allowed after his demurrer to the complaint is overruled, or to amend his answer after the plaintiff's demurrer to it is sustained. The relief which may be granted in such a case is governed by Section 580 of the Code of Civil Procedure which provides in part:

> The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint * * *.

Although this section is applicable in terms only when the defendant fails to answer, it is applied also in cases in which the defendant defaults after answer.[15] Thus, the general rule is that when a defendant's default has been entered, the plaintiff may proceed to take judgment against him for any relief to which the court believes the plaintiff is entitled, not exceeding that prayed in the complaint,[16] without giving the defendant any notice that application for judgment will be made.[17]

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[11] CAL. CODE CIV. PROC. § 1014; Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720 (1912); Baker v. Baker, 136 Cal. 302, 68 Pac. 971 (1902).

[12] In Progress Report of Assembly Interim Committee on Judiciary 34 (1955) that Committee stated it was of the opinion that requiring a motion or order to show cause when attorney's fees and costs are awarded at the time of judgment results in an unnecessary burden on courts and litigants.

[13] CAL. CODE CIV. PROC. § 594.

[14] See also *id.* § 1014, which provides in part:
"After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail."
An order to show cause is simply a notice of motion with a citation to the defendant to appear. Difani v. Riverside County Oil Co., 201 Cal. 210, 213, 256 Pac. 210, 212 (1927). Hence, the same rule presumably applies.

[15] Darsie v. Darsie, 49 Cal. App.2d 491, 122 P.2d 64 (1942) (defendant answered original complaint but failed to answer amended complaint); *cf.* Blackwell v. Blackwell, 86 Cal. App.2d 513, 194 P.2d 796 (1948) (where action tried as default action after answer filed, court may not award alimony in excess of that prayed in complaint).

[16] In at least some cases a judgment is void and subject to collateral attack insofar as it awards relief after default in excess of that prayed in the complaint. Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657 (1949).

[17] Taintor v. Superior Court, 95 Cal. App.2d 346, 213 P.2d 42 (1949); *cf.* Strong v. Shatto, 201 Cal. 555, 258 Pac. 71 (1927).

If a defendant wishes to be notified of proceedings in an action, he must both enter an appearance therein and take such further steps in the action as are necessary to avoid having a default entered against him.[18]

The rules just stated appear to apply in divorce and separate maintenance actions just as in other actions. For example, it has been held that when a defendant in a separate maintenance action has defaulted, judgment may be taken against him for any relief prayed in the complaint.[19] Moreover, it is not necessary when a money judgment is entered that the complaint have requested relief in or not exceeding a specific monetary amount; a complaint containing allegations concerning the husband's earning capacity and the parties' community property, and a prayer for support and maintenance and attorney's fees and costs in a reasonable amount has been held sufficient to support a default judgment awarding the wife support, attorney's fees and costs, and a share of the community property.[20] But a court may not enter a default judgment awarding alimony [21] or awarding the community property to the wife [22] or relating to the custody of children [23] or restraining the husband from molesting the wife [24] unless such relief is prayed in the complaint.

Thus, it seems reasonably clear that prior to the amendment of Section 137.3 in 1953, it would have been proper, in a divorce or separate maintenance action in which the defendant's default had been entered, to enter a judgment for attorney's fees and costs, not exceeding the amount prayed in the complaint or a reasonable amount when that had been prayed, even though the defendant had not been given notice that such order or judgment would be taken against him.[25] It is true that in *Baker* v. *Baker* [26] the Supreme Court held that a trial court could not make an award of attorney's fees and costs without prior notice to the defendant, thus terminating the pre-existing practice of obtaining such orders on ex parte application. But in the *Baker* case

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[18] The courts have refused to apply Code of Civil Procedure Sections 1010 and 1014, however, in some cases, particularly as to motions made after entry of judgment. Thus, in McDonald v. Severy, 6 Cal.2d 629, 59 P.2d 98 (1936) the court held that a defaulting defendant was entitled to notice of a motion to set aside a dismissal with prejudice in his favor, saying that such a motion is not a "paper" within the meaning of Code of Civil Procedure Section 1014. And in Thompson v. Cook, 20 Cal.2d 564, 127 P.2d 909 (1942), it was held that a defaulting defendant was entitled to notice of a motion to set aside a satisfaction of judgment against him and to revive the judgment. The court cited and followed the *McDonald* case and said that notice of a motion to revive a judgment is not a "paper" within the meaning of Section 1014. Neither court mentioned that Code of Civil Procedure Sections 1010 and 1014 both provide not only that "papers" need not be served on a party in default but also that "notice" need not be served upon him.

[19] Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605 (1941).

[20] *Ibid.*

[21] Buchanan v. Buchanan, 114 Cal. App.2d 120, 249 P.2d 577 (1952); Blackwell v. Blackwell, 86 Cal. App.2d 513, 194 P.2d 796 (1948); Darsie v. Darsie, 49 Cal. App.2d 491, 122 P.2d 64 (1942). *But cf.* Kroupa v. Kroupa, 91 Cal. App.2d 647, 205 P.2d 683 (1949) wherein it was held that a decree for alimony entered after the defendant's default may subsequently be modified under Civil Code Section 139 to increase the alimony to an amount larger than that prayed in the complaint. However, the court assumed that the defendant would be given notice of motion to modify the judgment.

[22] Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657 (1949) (judgment void and subject to collateral attack insofar as it awards community property to wife when not prayed in complaint).

[23] Gerardo v. Gerardo, 114 Cal. App.2d 371, 250 P.2d 276 (1952).

[24] Viera v. Viera, 107 Cal. App.2d 179, 236 P.2d 630 (1951).

[25] See note 18 *supra*. In Line v. Line, 75 Cal. App.2d 723, 171 P.2d 733 (1946) the court held that a party in default had no right to present evidence at the time of the hearing on the merits relating to the amount of attorney's fees to be awarded or to ask the appellate court to review the sufficiency of the evidence to support the award made. It does not appear from the report of the case, however, whether or not a motion or order to show cause relating to the application for attorney's fees was served on defendant prior to the hearing.

[26] 136 Cal. 302, 68 Pac. 971 (1902).

the order was made when the complaint was filed and before service of process on the defendant and the defendant subsequently filed an answer in the action thereby entitling himself to notice of all proceedings therein under Code of Civil Procedure Section 1014. While it is true that the language of the court in the *Baker* case is sufficiently broad to suggest that an order for attorney's fees and costs can never be made without notice to the defendant of the application for the order, there is no indication in later cases that these statements in the opinion have been thought to be applicable when the defendant's right to notice has been forfeited under Section 1010 of the Code of Civil Procedure by his failure to appear in the action within the time allowed by law or by the entry of his default.

POLICY CONSIDERATIONS AND RECOMMENDATIONS

There would not seem to be any good reason why, when attorney's fees and costs have been prayed in the complaint, cross-complaint or answer, a party should be entitled to any notice, other than that of the hearing on the merits itself, when the application for such fees and costs is made at that hearing. Nor does it seem necessary or just to put a defaulting defendant in an action for annulment, divorce, separate maintenance, or support and education of children in any better position than any other defaulting defendant insofar as notice of proceedings in the action is concerned. Such a defendant has been put on notice by the complaint of the claims made and relief sought against him; he is as much bound to know the law as found in Code of Civil Procedure Sections 1010 and 1014 as other defendants; he is, like them, able to put himself in a position to receive notice by participating in the action to the extent necessary to avoid being defaulted. Sections 1010 and 1014 of the Code of Civil Procedure should apply as fully to his case as to any other.

If the question were presented to an appellate court today, the court might hold both that a notice of motion or order to show cause is not required when attorney's fees and costs are determined and awarded at the hearing on the merits and that such an award may be made without notice to a defaulting defendant. However, the language of Section 137.3 raises some doubt on this point. It is recommended, therefore, that Section 137.3 be amended to provide that no application, other than an oral motion in open court, is necessary when attorney's fees or costs or both are awarded in either of these situations. It is believed that a party in default should be given notice, however, when an award of attorney's fees and costs is to be made or modified *after* judgment for two reasons: (1) the courts appear to have made such a distinction in applying Code of Civil Procedure Sections 1010 and 1014 generally, holding that a defendant is entitled to notice of motions made after judgment;[27] (2) an award of attorney's fees and costs to cover services rendered after judgment is sufficiently rare in cases in which the defendant has defaulted that the defendant should not be required to anticipate it.

[27] See note 18 *supra*.

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